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# In The Supreme Court of the United States

ALBERTO R. GONZALES, Attorney General,

*Petitioner,*

v.

LEROY CARHART, et al.,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## BRIEF OF GIANNA JESSEN, ZACHARY KLOPFENSTEIN (BY AND THROUGH HIS PARENTS, TERRY AND JILL KLOPFENSTEIN), AND THE CENTER FOR MORAL CLARITY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICI CURIAE*[1]

On April 5, 1977, a pregnant 17 year old young woman sought a saline abortion at seven months pregnant. The saline abortion procedure involves injecting saline solution into the amniotic fluid. During this abortion procedure, the saline solution burns the fetus and causes it to be delivered dead. This young woman, Tina, was informed by the staff at the abortion clinic that it was in her best interest to obtain an abortion because her mom was already on welfare. Tina and the doctor who injected her abdomen with saline never looked each other in the eye and the doctor only said one word during the entire procedure: "saline." It was a command to the nurse to hand him the saline solution he injected into Tina.

Tina and the other women injected with the solution were required to drink heavy amounts of water and walk around, waiting for their baby to die so that their bodies could discharge it. Tina waited in the clinic overnight. However, something "abnormal" happened. In the early hours of April 6, Tina went into labor. Tina was surrounded by a room full of women who had delivered limp, lifeless babies. Tina, unassisted by any nurse or other worker at the abortion clinic, gave birth to a living baby girl, *amicus* Gianna. Other women were crying, the nurses were shocked.

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[1] The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to this Court's Rule 37.6, none of the counsel for the parties have authored this brief in whole or in part and no one other than *amici* or its counsel contributed money or services to the preparation and submission of this brief.

Gianna was born that morning before the abortionist's scheduled shift. Since the abortionist was not available, Gianna was sent to a hospital, escaping an almost sure death at the hands of the abortionist. She did not completely escape injury from the saline abortion attempt and remained in the hospital for three months. She was later placed with a foster family who specialized in high-risk children.

Due to lack of oxygen supply to her during the abortion, Gianna has been forced to live with cerebral palsy. Although doctors never believed she would be able to sit up or walk, she has exceeded all probabilities. She can now walk *and* run. In April of 2006, she ran in the London marathon. In 1996 and 2000, Gianna testified before Congress concerning her survival of a late-term abortion.

*Amicus* Zachary, represented by and through his adoptive parents, Terry and Jill Klopfenstein, is also a miracle baby grown up. Zachary is nine-years-old. Zachary's biological mother was addicted to and was using crack cocaine during her pregnancy. When Zachary was in his biological mother's womb, he was diagnosed with hydrocephalus and minimal cortex. Zachary had an abnormal amount of fluid in his head and little chance of survival. He was a baby of severe abnormalities – one that would easily fall within a "health exception." Zachary was born on the evening of February 28, 1997 at 39 weeks gestation. With Zachary's head likely visible, his skull was punctured and the fluid was drained.[2] The doctor assumed

[2] The procedure Zachary endured is called cephalocentesis. It is not a partial-birth abortion. It is a medical procedure that is done to shrink the oversized head of a baby with hydrocephalus and is usually fatal. Zachary, however, is in a unique position to demonstrate that life, even

(Continued on following page)

Zachary would die as a result. Zachary's heart rate was around 100, but he had little respiration and was ashy in color.

The doctors placed "comfort care only" orders for Zachary, which means no one was to assist in reviving him, no oxygen, no respiratory assistance, just allow him to die. The doctors did not even aspirate him after delivery, which is a standard practice for all newborns. Zachary refused to die. He survived that Friday night. He survived Saturday. He survived Sunday. Zachary refused to die and was given no help to live. Finally, on Monday, a neurosurgeon was called. Zachary needed surgery right away, but first a blood clot caused by the procedure needed to be drained.[3] Zachary was finally cared for and lives today with mental and physical handicaps caused by his mistreatment, yet he has overcome many of the significant handicaps that plagued him since birth.

*Amicus* Center for Moral Clarity, Inc. ("CMC") is a 501(c)(3) tax-exempt non-profit corporation dedicated to advancing the non-partisan causes of racial and gender equality, the eradication of poverty, and raising the standard of moral excellence for this nation. It is a Christ-centered organization founded by Senior Pastor Rod Parsley of World Harvest Church that is dedicated to giving a voice to the values central to the faith.

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life determined unworthy by some medical professionals, is precious and worthy of a chance.

[3] If Zachary had been deemed worthy of salvation, a caesarean section would have been an easy alternative that would not have put Zachary's life at risk.

This is the first time CMC has appeared as *amicus* before any court. The reason for CMC's appearance is its concern regarding post-abortion counseling services and the significant impact partial-birth abortion is having on the psychological well being of women that terminate their pregnancies in such a manner. The emotional scarring associated with such a terrible procedure leaves life-long wounds. With partial-birth abortion on the fringes of the wide spectrum of legal abortions, CMC feels it must participate on behalf of women everywhere.

*Amici* share a common objective: to bring to the Court's attention the survivor's perspective of a late-term or partial-birth abortion and the valid reasons why deliberative bodies, not courts, should set this difficult public policy. With so much argument on both sides regarding this critical issue, it is easy for the Court to lose sight of the true life interests at stake in a partial-birth abortion. With partial-birth abortion lying on the outer markers, it is perfectly within the purview of Congress to make the tough public policy decision to choose to favor the life of the almost born, such as the lives of *amici* Gianna and Zachary, over the low water mark of the liberty interest of a woman to end the young life she carries.

## SUMMARY OF ARGUMENT

The American system of government is dependent upon the proper role of its branches. The Legislative body is the policy-making body, making difficult policy decisions for the country after extensive deliberation, debate, and analysis in representing the people. As the Founders of this country and centuries of American jurisprudence

attest, the Legislature is in a much better position to serve this role than the Courts. In fact, when a court oversteps into policymaking, it directly restricts the liberty and freedom of The People, substituting its moral and policy beliefs for those of The People and their representative body – Congress.

Partial-birth abortion is a deep public policy issue involving many complex issues of life and death, medicine, psychology, societal impacts, and increased callousness, among many other concerns. Congress can properly and fully consider such concerns, in public and through the exchange of ideas. It is their role.

The lives of people like *amici* are exactly the kinds of evidence Congress can and should be able to consider.

## ARGUMENT

### I. Congress deserves deference when it makes public policy decisions, especially when such decisions are at the margins of constitutional jurisprudence.

This case does not present an issue that challenges *Roe* or *Casey*.[4] Instead, this is a case regarding a public policy decision beyond the margins of the judicially crafted right to an abortion that involves a substantial number of factors and competing interests and extensive public debate. The very purpose of Congress is to make such

[4] *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 510 U.S. 1309 (1994).

public policy decisions, and Congress is best equipped to do so.

> "The members of the Legislative department . . . are numerous. They are distributed and dwell among the people at large. Their connections of blood, of friendship, and of acquaintance embrace a great proportion of the most influential part of the society . . . they are more immediately the confidential guardians of their rights and liberties."

THE FEDERALIST NO. 49, at 275 (Alexander Hamilton) (Benjamin Warner ed., 1818). Congress investigates, debates, and deliberates on public policy issues and is in a far superior position to formulate public policy decisions. *See Stenberg v. Carhart*, 530 U.S. 914, 968 (2000) ("Irrespective of the difficulty of the task, legislatures, with their superior fact finding capabilities, are certainly better able to make the necessary judgments than are courts.") (Kennedy, J., dissenting) (quoting *Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 456 n. 4 (1983) (O'Connor, J., dissenting)). It would be improper to presume otherwise. As Luther Martin, one of the delegates to the Constitutional Convention attested: "[a] knowledge of mankind and of legislative affairs cannot be presumed to belong in a higher degree to the Judges than to the Legislature."[6]

### A. Partial-Birth Abortion lies beyond the margins.

Partial-birth abortion is a "gruesome procedure." *Carhart*, 530 U.S. at 946 (Stevens, J., concurring). It is a

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[6] JAMES MADISON, 2 THE PAPERS OF JAMES MADISON 1166 (Henry D. Gilpin, ed., Langtree & O'Sullivan 1840) (Luther Martin, during the debates of Saturday, July 21, 1787).

procedure that "millions find hard to distinguish from infanticide and that the Court hesitates even to describe." *Id.* at 982 (Thomas, J., dissenting). It is a procedure that "many decent and civilized people find so abhorrent as to be among the most serious crimes against human life . . . " *Id.* at 979 (Kennedy, J., dissenting). It is a procedure that "is so horrible that the most clinical description of it evokes a shudder of revulsion." *Id.* at 953 (Scalia, J., dissenting). It is a procedure that is "subject to the most severe moral condemnation, condemnation reserved for the most repulsive human conduct." *Id.* at 963 (Kennedy, J., dissenting).

As described in *Carhart*:

> "[a]t this point, the right-handed surgeon slides the fingers of the left hand along the back of the fetus and hooks the shoulders of the fetus with the index and ring fingers (palm down). The surgeon takes a pair of blunt curved Metzenbaum scissors in the right hand. He carefully advances the tip, curved down, along the spine and under his middle finger until he feels it contact the base of the skull under the tip of his middle finger. The surgeon then forces the scissors into the base of the skull or into the foramen magnum. Having safely entered the skull, he spreads the scissors to enlarge the opening. The surgeon removes the scissors and introduces a catheter into this hole and evacuates the skull contents . . . In cases in which the physician inadvertently dilates the woman to too great a degree, the physician will have to hold the fetus inside the woman so that he can perform the procedure."

*Id.* at 988-89 (Thomas, J., dissenting) (internal citations omitted). Evidence presented to Congress at a hearing on

partial-birth abortion also described the scene. As Congress heard from an eyewitness to partial-birth abortion:

> "[t]he baby's little fingers were clasping and unclasping, and his little feet were kicking. Then the doctor stuck the scissors in the back of his head, and the baby's arms jerked out, like a startle reaction, like a flinch, like a baby does when he thinks he is going to fall. The doctor opened up the scissors, stuck a high-powered suction tube into the opening, and sucked the baby's brains out. Now the baby went completely limp . . . Dr. Haskell delivered the baby's head. He cut the umbilical cord and delivered the placenta. He threw that baby in a pan, along with the placenta and the instruments he'd used. I saw the baby move in the pan. I asked another nurse and she said it was just 'reflexes.'"[6]

Of course, *amicus* Gianna Jessen had first-hand experience with a late-term abortion. To this day, Ms. Jessen bears the scar of that struggle in the form of her cerebral palsy, but she lives . . . beautifully. Baby Zachary too was condemned to die. His medical condition was severe; he would surely die or live a miserable life according to the medical experts. Yet, both *amici* are alive today to tell their stories and testify by their lives that this is not a matter for courts but rather involves a deep public policy debate that requires open deliberation and exchange of ideas that is better suited for the legislature.

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[6] *Id.* at 1007; *The Partial-Birth Abortion Ban Act of 1995: Hearing on H.R. 1833 Before the Senate Comm. on the Judiciary*, 104th Cong. 18 (Nov. 17, 1995) (statement of Brenda Pratt Shafer).

If a doctor's hand slips accidentally, a baby doomed to die through a puncture in the back of the skull is born alive. What does the doctor legally do in this situation? What does society expect of the doctor when he makes a mistake and allows a little girl to slip through his fingers and be accidentally delivered? Who in the room has the power to save that child who is accidentally born? Will a nurse step forward? Is the mother strapped to a table responsible for saving the baby once it is born? Why cannot the doctor go ahead with the procedure even if this occurs? What is the difference between the head being held by a doctor in the birth canal and a head that is fully exposed? It is appropriate for Congress to address these policy questions through its deliberative process, including the exchange of ideas, in the open, and the analysis of the moral and social implications, finding the best conclusion and policy for this country.

### B. This Court defers to Congress in its policy making role.

It is proper for Congress to "take into account the grave moral issues presented by a new abortion method." *Carhart*, 530 U.S. at 967 (Kennedy, J., dissenting). Justice Kennedy went on to cite several cases for the proposition that the Court should give wide deference to legislative bodies when they decide close issues involving medical disagreement and uncertainty. *Id.* at 970-72 (Kennedy, J., dissenting) (collecting cases). Justice Kennedy's point is well taken. It is not proper for the Court to "tie the State's hands." Congress should be "afforded the widest latitude" and the Court "should be cautious not to rewrite legislation." *Id.* On the fringe of a constitutional right lies an area where public policy interests are of substantially

increasing importance and the right at issue is accorded less deference. There is no clearer example of such a public policy threshold than partial-birth abortion.

Viewed in the light most favorable to Plaintiffs, the best that can be said is that there is some medical ambiguity or uncertainty surrounding partial-birth abortion. It is within this "play in the joints" that Congress is accorded the most deference. The proposition that Congress or a legislative body is in a better position to make these close calls than the Court is well-established American jurisprudence. *See, e.g., Kansas v. Hendricks*, 521 U.S. 346, 360 n. 3 (1997) ("it is precisely where such [public policy] disagreement exists that legislatures have been afforded the widest latitude"); *Jones v. United States*, 463 U.S. 354, 370 (1983) ("legislative options must be especially broad and courts should be cautious not to rewrite legislation").

Thus, the Court's deference to Congress' role as the national policymaker is in some measure due to the acknowledgement that Congress "is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions." *Turner II*, 520 U.S. at 195 (internal quotations omitted).[7]

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[7] "Though different in degree, the deference to Congress is in one respect akin to deference owed to administrative agencies because of their expertise. *See FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 814 (1978) ("Complete factual support in the record for the [FCC's] judgment or prediction is not possible or required; 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency' "); *United States v. Midwest Video Corp.*, 406 U.S. 649, 674 (1972) (it was "beyond the competence of the Court of Appeals itself to assess the relative risk and benefits" of FCC policy, so long as that policy was based on findings supported by evidence). This is not the sum of the

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> A common justification for judicial deference to the legislature is the latter's unique expertise in performing the factfinding function essential to determinations of policy. To the extent that factfinding and fact evaluation informs a constitutional inquiry as well, legislatures are often considered superior to courts in educating themselves on and calculating the relative weight of the necessary background data. Legislatures, unlike courts, have substantial staff, funds, time and procedures to devote to effective information gathering and sorting. Additionally, deference with regard to some legislative matters reduces what would otherwise be an unmanageable burden on limited judicial resources.

Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 CORNELL L. REV. 527, 578-79 (1994) (footnotes omitted).

### C. From the foundation of this Nation, it has been clear that the Court should show great deference to the public policy decisions of Congress.

During the drafting and ratification of the Constitution, it is clear that this Nation's Founders understood

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matter, however. We owe Congress' findings an additional measure of deference out of respect for its authority to exercise the legislative power. Even in the realm of First Amendment questions where Congress must base its conclusions upon substantial evidence, deference must be accorded to its findings as to the harm to be avoided and to the remedial measures adopted for that end, lest we infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy." *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 196 (1997) (*Turner II*).

that Congress is the supreme branch governing public policy decisions, if for no other reason than Congress is directly accountable to the people. As Thomas Jefferson expounded in a letter to Judge Spencer Roane:

> "our Constitution . . . intending to establish three departments, co-ordinate and independent that they might check and balance one another, it has given – according to this opinion – to one of them alone the right to prescribe rules for the government of the others; and to that one, too, which is unelected by and independent of the nation . . . The Constitution, on this hypothesis, is a mere thing of wax in the hands of the Judiciary which they may twist and shape into any form they please."[8]

Rufus King, signer of the Constitution, warned during the Constitutional Convention, "the judges must interpret the laws; they ought not be legislators." RUFUS KING, RUFUS KING'S RECORD OF THE CONSTITUTIONAL CONVENTION (June 4, 1787), *reprinted in* THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 108 (Max Farrand ed., Yale University Press, 1911).[9] It is improper for the Court to intrude upon Congress' sphere as a policymaker.

Thomas Jefferson earlier warned that "the opinion which gives to the judges the right to decide what laws are

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[8] THOMAS JEFFERSON, 15 WRITINGS OF THOMAS JEFFERSON 215 (Albert Ellery Bergh ed., Thomas Jefferson Memorial Association 1904) (Letter from Thomas Jefferson to Judge Spencer Roane, Sept. 6, 1819).

[9] Alexander Hamilton explained in FEDERALIST NO. 81, "there is not a syllable in the plan [Constitution] which directly empowers the national courts to construe the laws according to the spirit of the Constitution." THE FEDERALIST NO. 81, at 436 (Alexander Hamilton) (Benjamin Warner ed., 1818).

and are not constitutional and what not, not only for themselves in their own sphere of action, but for the Legislature and Executive also in their spheres, would make the Judiciary a despotic branch." THOMAS JEFFERSON, LETTER TO ABIGAIL ADAMS (September 11, 1804), *reprinted in* 4 MEMOIR, CORRESPONDENCE, AND MISCELLANIES, FROM THE PAPERS OF THOMAS JEFFERSON at 27 (Thomas Jefferson Randolph ed., Gray and Bowen, 1830). President Lincoln, two score and seventeen years later, stated in his Inaugural Address in response to the Court's decision in *Dred Scott v. Sandford*, 60 U.S. 393 (1857),

> "if the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made . . . the people will have ceased to be their own rulers, having . . . resigned their government into the hands of that eminent tribunal."

ABRAHAM LINCOLN, INAUGURAL ADDRESS (March 4, 1861), *reprinted in* 4 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897 at 9 (James D. Richardson ed., Published by Authority of Congress 1899).

All of this is not to say the Court is deprived of judicial review. It quite certainly is not. It is undisputed, as James Wilson, signer of the Constitution and early Supreme Court justice, pointed out during the Pennsylvania Constitution ratification debate, "when they [the judges] consider its [a law's] principles and find it to be incompatible with the superior power of the Constitution, it is their duty to pronounce it void." JAMES WILSON, JAMES WILSON AT THE PENNSYLVANIA RATIFICATION DEBATES (December 1, 1787), *reprinted in*, 2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE

FEDERAL CONSTITUTION at 446 (Jonathan Elliot ed., Printed for the Editor 1836).[10]

Some may argue that for the Court to defer to Congress in its policy making role subjects the minority to the will or tyranny of the majority. Setting aside for a moment that Congress, by its very design, has built in safeguards against such a majority, not the least of which is the pocket veto whereby one person may defeat legislation supported by a majority, there is one major flaw with this argument. The Fourteenth Amendment, which serves as the constitutional basis or reason for the abortion right, was passed by the majority. It was the majority, as expressed through an act of Congress, who ignored the *Dred Scott* decision and banned slavery in the territories. THE DEBATES AND PROCEEDINGS OF THE SECOND SESSION OF THE THIRTY-SEVENTH CONGRESS 2618 (John C. Rives, ed., Congressional Globe Office 1862) (June 9, 1862). The majority freed the slaves, the majority (of males) extended voting rights to women, the majority passed the Civil

[10] Of course, James Wilson also "moved as an amendment 'that the Supreme National Judiciary should be associated with the Executive in the revisionary power.' . . . The Judiciary ought to have an opportunity of remonstrating against projected encroachments on the people . . . counteracting by the weight of their opinions the improper views of the Legislature." JAMES MADISON, 2 THE PAPERS OF JAMES MADISON 1161-62 (Henry D. Gilpin, ed., Langtree & O'Sullivan 1840) (James Wilson during the debates of Saturday, July 21, 1787). This proposal was voted down on four separate occasions. *Id.* at 791, 812, 1171, VOL. III at 1331 (debates of Monday, June 4, 1787; debates of Wednesday, June 6, 1787; debates of Saturday, July 21, 1787; debates of Wednesday, August 15, 1787, respectively).

Rights Act, the majority has, for the sake of the minority, secured the rights and privileges we all now enjoy.[11]

Congress, not the Court, answers to the citizens of this country. Congress painstakingly gathers information, conducts hearings, investigates, debates, and deliberates. There are committee votes, pocket vetoes and negotiations. There are a whole host of obstacles to the enactment of new legislation, bicameralism chief among these. All of this process, the factual record developed through this process, and the ever present public pressure associated with elective office serve to craft public policy decisions that are entitled to great deference. In sum, "[w]e should not forget that legislatures are ultimate guardians of the liberty and welfare of the people." *Planned Parenthood v. Casey*, 947 F.2d 682, 726 (3rd Cir. 1991) (Alito, J., concurring in part and dissenting in part).

## II. Congress should be free to consider a broad array of evidence when acting as a policymaker, including the experiences of those intimately familiar with late-term and partial-birth abortions.

Some would argue that *amici* Gianna Jessen and Zachary were "constitutional non-persons" or "'human beings' who are not 'constitutional persons.'" *Alexander v. Whitman*, 114 F.3d 1392, 1409 (3rd Cir. 1997) (Alito, J., concurring). That "is unfortunate." *Id.* Partial-birth abortion extends beyond an even broad interpretation of

[11] It was Congress who passed the 1875 Civil Rights Act (various sections of 18 and 28 U.S.C.) to protect African-Americans against racial discrimination in places of public accommodation. It was the Court who struck it down. *See Civil Rights Cases*, 109 U.S. 3 (1883).

the right created in *Roe v. Wade*. The difference, of course, is that the baby is not an unseen, unborn creature. It is a baby fully capable of life outside of her mother's womb whose life is ended in the process of delivery, with her body completely exposed to the outside world, save her face. That the people of this country should be concerned and Congress should be allowed to properly legislate in this fringe area is obvious.[12] Any civilized society would.

### A. Congress may consider evidence that psychological harm to women occurs as a result of abortion.

*Amici* do not stake a claim that it is scientific fact women suffer Post Traumatic Stress Disorder (PTSD) as a result of having late-term or partial-birth abortions. It is not necessary for post-abortion PTSD to be proven beyond reasonable scientific doubt before Congress may rely upon the evidence that does exist to conclude that at least partial-birth abortion is so fringe and naturally repulsive as to be a trigger of PTSD.

There are about a "thousand affidavits of women who have had abortions and claim to have suffered long-term emotional damage and impaired relationships from their decision . . . [and] [s]tudies by scientists . . . suggest that women may be affected emotionally and physically for years afterward and may be more prone to engage in high-risk, self-destructive conduct as a result of having had abortions." *See McCorvey v. Hill*, 385 F.3d 846, 850-51 (5th

[12] Congress serves at the pleasure of the voting populous. Our form of government is predicated upon an enduring principle that all power, all authority, is drawn from the well of the people at large.

Cir. 2004) (Jones, J., concurring) (citing affidavits and several scientific studies). There are numerous studies that demonstrate a link between abortion and psychological trauma.[13] These studies and affidavits provide compelling evidence that there is indeed a problem, the magnitude of which is only beginning to unfold.[14]

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[13] *See* C. A. Barnard, *The Long-Term Psychosocial Effects of Abortion* (Institute for Pregnancy Loss, 1990); W. Franz & D. Reardon, *Differential Impact of Abortion on Adolescents and Adults*, 27(105) Adolescence 161-72 (1992); M. Gissler, et al., *Suicides After Pregnancy in Finland*: 1987-94: Register Linkage Study, 313 British Medical J. 1431-34 (1996); B. Lask; J. Lydon, et al., *Pregnancy Decision Making as a Significant Life Event: A Commitment Approach*, 71(1) J. Personality and Soc. Psychology, 141-51 (1996); B. Major & C. Cozzarelli, *Psychosocial Predictors of Adjustment to Abortion*, 48(3) J. Soc. Issues, 121-42 (1992); W. B. Miller, *An Empirical Study of the Psychological Antecedents and Consequences of Induced Abortion*, 48(3) J. Soc. Issues 67-93 (1992); W. B. Miller, *Testing a Model of the Psychological Consequences of Abortion, The New Civil War: The Psychology, Culture, and Politics of Abortion*, (Linda J. Beckman & S. Maria Harvey, eds., 1998); H. Sderberg, et al., *Emotional Distress Following Induced Abortion: A Study of Incidence and Determinants Among Abortees in Malm Sweden*, 79 Eur. J. Obstet. Gynecol. Reprod. Biol. 173-78 (1998); H. P. Vaughan, *Canonical Variates of Post-Abortion Syndrome* (Institute for Pregnancy Loss, 1990).

[14] There is evidence to the contrary, Planned Parenthood published a report on its website that indicates there is a positive relationship between abortion and the psychological well-being of women that have abortions. According to Planned Parenthood, a woman is psychologically better off having had an abortion. *See* Planned Parenthood Federation of America, *The Emotional Effects of Induced Abortion, available at* http://www.plannedparenthood.com/pp2/portal/files/portal/medicalinfo/abortion/fact-010600-emoteff.xml#1097838269784::2874363106508449295 (last visited May 19, 2006). However, "[t]he Constitution gives to Congress the role of weighing conflicting evidence in the legislative process." *Turner II*, 520 U.S. at 199.

**B. Congressional consideration may include such factors as Post Traumatic Stress Disorder, the diffusion of responsibility and how partial-birth abortion is merely a veneer to provide moral distance for the doctor and mother.**

The book, ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY,[15] is a leading study on how advanced militaries have learned to train their soldiers to kill the enemy as it collects historical studies regarding the ability of soldiers to kill fellow human beings. According to Lt. Col. Grossman, the author and former psychology professor at the United States Military Academy at West Point, there are a few factors that enable a human being to overcome her psychological protective mechanism that causes a revolting shudder at the very thought of killing another human being. Two of the factors are emotional and physical distance between the killer and victim.

Physical distance is understood easily. According to Grossman, it is far easier to kill when one cannot see what one is killing. That is why bomber pilots are much less predicated toward PTSD than infantrymen who must on occasion look into the whites of the enemy's eyes. In the abortion context, it is easy to see why partial-birth abortion is beyond the margins. A baby entirely in the womb is physically removed from the realities of existence. Sure, their images are available on ultrasound and technology continues to close the physical distance that separates the

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[15] DAVID A. GROSSMAN, LT. COL., ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY (Bay Back Books 1995).

unborn from the visible world. However, the unborn remain largely unseen, and completely so with the naked eye. In partial-birth abortion, the baby's body is visible to all witnesses. The witnesses see the hands clasping, the legs kicking, the intimate struggle for life. Physical distance is closed, and the taking of life becomes more apparent. This is a natural psychological condition of a civilized society. It is within the purview of Congress to make policy decisions to restrict a procedure that is so utterly outside the bounds of natural human behavior and which causes damage to those nearby, including an increased callousness toward life.

Emotional distance has cultural and moral components. According to Grossman, part of the training of a soldier involves dehumanizing the enemy to make killing the enemy easier. As Grossman states, the goal of cultural distance is to make the enemy "inferior forms of life." *Id.* at 160. Cultural distance in the abortion context comes when a baby is referred to as a "fetus" or "tissue" that does not experience pain. The "fetus" becomes an inferior form of life. It cannot talk or sustain its own life detached from its mother. This cultural distance is greatly shortened when the baby is capable of sustaining its own life.

Moral distance involves seeing a larger picture or higher reason for the carnage. In the case of abortion in general, the right of a woman to attain autonomy and self-determination serve to create that moral justification. But for partial-birth abortion, that moral distance is greatly shortened because, as the lives of *amici* demonstrate, the children have a self-determination claim as well. They are capable of sustaining their own lives at the time of their late-term abortions, as *amici* so aptly proved. Therefore, Congress is in the best position to understand the will of

the people, balance considerations, and respond with hard policy decisions when physical and emotional distance is shortened by the aberration of partial-birth abortion.

This explains why the head must not come out of the birthing canal, why our society will not tolerate the murder of a baby that is delivered. We can see her face, she makes noises and we can look into her eyes. Even if the doctor must artificially hide the head in the canal because it may easily slip out, he dare not allow that to happen. Then our culture will not stand for the killing of the baby. The psychological veneer of hiding the baby's face is the only difference between a partial-birth abortion and killing the baby. Such a close and artificial distinction takes partial-birth abortion outside of the normal abortion framework envisioned in *Roe* and *Casey* where physical and emotional distances are much greater. Congress is in the superior position to identify this distinction, balance the equities and medical evidence, and treat partial-birth abortion as something completely different than previability abortion.

### C. It is within the legislative ken of Congress to consider the survival of children of late-term or partial-birth abortions in determining their life claim outweighs the liberty interest of the mother at the outer most fringes of that interest.

As *amici* Gianna and Zachary can directly attest, the baby who suffers during a partial-birth abortion is a living, breathing citizen. Zachary, no doubt who presents an extreme situation in which he was declared certain to die anyway or else live a worthless life. Zachary did not get a voice in this decision. Indeed, Zachary's voice could not be

heard. Certainly Congress and the American people have the ability to speak for Zachary. Certainly Congress may speak for his unspoken desire to live. And it is indeed obvious from the medical records that Zachary spoke of his desire to live upon delivery. He spoke not through words, but through his actions. He refused to die. He refused to die even though the neurosurgeon stated in the record that Zachary's outlook was "devastating." Now nine years old, Zachary smiles in a picture wearing an Air Force uniform, a testimony to his triumph over physical challenge. Certainly Congress may look to evidence such as this and draw the line on the outer fringes of abortion and declare the taking of human life that is almost born to be beyond the pale of civil endurance.

Gianna just completed the London Marathon in April 2006. While she endures cerebral palsy and other afflictions that remain as a result of the botched abortion, Gianna continues to live her life as a living testament to those that did not survive their own demise. Her accomplishments are their accomplishments. Her strides are for them. Cannot a legislative body look to this woman and say it is an atrocity to end a life such as this? Cannot Congress declare that it must draw the line here for the living?

Congress may also consider the dark side of late-term or partial-birth abortion procedures gone wrong. Abortionist Benjamin Waddill, a member of the Association of Planned Parenthood Physicians, performed a saline abortion on 19 year-old Mary Weaver on March 2, 1977, at California's Westminster Community Hospital. Mary Weaver was estimated at 28 weeks pregnant. Dr. Waddill administered a saline abortion. Ms. Weaver, however, gave birth to a live baby. Dr. Waddill returned to the hospital's newborn

nursery, where the baby was located. According to Dr. Ronald Cornelsen, a witness, Dr. Waddill choked the baby girl four separate times.[16]

> "When the hospital's chief pediatrician, Dr. Ronald Cornelsen, arrived in the nursery, he said Waddill put his hand around the baby's throat and complained, 'This baby won't quit breathing.' Cornelsen says he checked the infant's heart and found it beating 60 to 70 times a minute. But then, Cornelsen said, Waddill pressed down on her throat and discussed other methods of 'disposing' of her, including drowning her in the nursery sink. As Cornelsen tells it, Waddill said: 'This baby can't live. It will be a big mess . . . Can you think of something else?' Sick to his stomach, Cornelsen retreated to another part of the nursery. Waddill joined him moments later. 'I think the baby is dead,' he said."

Susan Fraker & Janet Huck, *The Trial of Dr. Waddill*, NEWSWEEK, April 3, 1978, at 35. Cannot Congress consider the callousness created by allowing such a procedure and the damage that it causes?

At least Zachary was given comfort care. Ximena Renaerts of Canada is the product of a botched late-term abortion. After being born at the abortion clinic in a bed pan on December 16, 1985, she was taken to Vancouver General Hospital where, while alive, she was stored in a room on a cold steel counter that was used to store "dead

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[16] Jeffrey Perlman, *Waddill Trial Has Heavy Impact*, LOS ANGELES TIMES, May 15, 1978, at Part I-3; Dexter Duggan, *California Abortionist Testifies in His Own Defense*, LIFE ADVOCATE, May/June 1979, at 14-16; Susan Fraker & Janet Huck, *The Trial of Dr. Waddill*, NEWSWEEK, April 3, 1978, at 35; *The Ordeal of a Divided Jury*, TIME, May 22, 1978, at 24.

fetuses." A nurse found her alive forty minutes later, and now Ximena, still alive, is confined to a wheelchair and suffers from cerebral palsy.[17] Congress surely has the power to look to this type of evidence and begin to draw boundaries at the outer markers.

It is impossible to forget the picture of the little girl missing an arm as the result of a botched late-term abortion. In October of 1991, Rosa Rodriguez, twenty years-old at the time, sought a late-term abortion on New York's Lower East Side from abortionist Abu Hayat. Ms. Rodriguez, eight months pregnant, changed her mind and did not want to go through with the abortion. Hayat responded that it was impossible to stop, and that he had to continue. Hayat's assistants held Ms. Rodriguez down while Hayat sedated her. When she became conscious, she was told the abortion was incomplete and she needed to return. After experiencing increasing pain and bleeding, her mother took her to Jamaica Hospital by taxi. Five hours later, baby Ana Rosa was born.[18] Although Hayat tore off Ana Rosa's right arm, she grew up as a healthy little girl. This healthy baby girl, a teenager by now, will forever be reminded that her arm was pulled from her body due to a late-term abortion.

When beyond the margins of abortion, it is perfectly appropriate for Congress to consider the horrors of the partial-birth abortion procedure and draw a line that

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[17] Neal Hall, *Jury Will Hear Malpractice Lawsuit Over Girl Born After Failed Abortion: A Judge Has Ruled That The Case of a Baby Born Brain-damaged And Left to Die Is Not Too Complex For Jurors*; VANCOUVER SUN, April 29, 1998, at B3.

[18] David Kocieniewski, *Ana's Plight; Mom Says She'll Be Honest With Baby Maimed In Abortion*; NEWSDAY, February 24, 1993, at 3.

distinguishes barbarism from civility. Nowhere is it more clear that Congress has the right, the duty to protect those children who are killed in the process of their birth. The people through their elected representatives may make this public policy decision if for no other reason than there is no one else to speak for those that find only their head caught in the great chasm between life and death, suspended in the purgatory of the vestibule of life, the birth canal. Perhaps it may be said that such children are probably the most "discrete and insular" class of persons ever described. *United States v. Carolene Products*, 304 U.S. 144, 153 (1938).

> Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it . . . .the spirit of liberty remembers that not even a sparrow falls to earth unheeded.[19]

One of the reasons for this country's greatness is that it protects the vulnerable and the weak. That is the American way. Partial-birth abortion involves deep public policy considerations including brutality, life and death, the coarsening of our society, and the danger of the degradation of and callousness toward human life.

The People of this country have a right to make this call. Judicially stripping it from the hands of the People would be a mistake and a great loss of liberty.

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[19] LEARNED HAND, THE SPIRIT OF LIBERTY 190 (Irving Dillard ed., 3d ed. 1960) ("The Spirit of Liberty," speech at an "I Am an American Day" ceremony, Central Park, New York City, May 21, 1944).

## CONCLUSION

The People, through their elected representatives in Congress, are the rightful vessels of power to determine public policy decisions. History and prudence continuously caution against the Court traversing into the murky realm of public policy determinations. The Court should reverse the judgment of the court of appeals and let the People of this country speak for themselves.

Respectfully submitted,

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